

APPEAL NO. 010742

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 20, 2001. The hearing officer determined that the respondent (claimant) had disability from October 17, 2000, through February 26, 2001.

The appellant (carrier) appeals, arguing that either the claimant did not have disability during that time frame or the claimant's inability to obtain and retain employment at his preinjury wage was due to his incarceration that ended on October 16, 2000. The file does not contain a response from the claimant.

DECISION

Affirmed.

The pertinent background facts are not greatly disputed. The claimant was employed as a "utility worker" for a concern (employer) that provided food services to a university. The parties stipulated that the claimant had sustained a compensable low back injury on _____ (in a slip-and-fall accident). A few days later, the claimant asked to go to a doctor and the employer sent the claimant to (clinic), where he was seen by Dr. B. Dr. B diagnosed the claimant with a lumbar strain and returned the claimant to work with repetitive lifting and pushing/pulling restrictions. The employer accommodated the claimant's restrictions and the claimant continued to work full time within the restrictions until he was incarcerated on October 2, 2000. The employer was made aware of the claimant's incarceration, but refused to keep his job open. The claimant was released from jail on October 16, 2000, and called the employer requesting a full-time job, but he was told there were no positions open.

The claimant changed treating doctors to Dr. C, who, in a Work Status Report (TWCC-73) dated October 27, 2000, released the claimant to work four hours a day with certain twisting, bending, and lifting restrictions. Whether the employer received a copy of that report is disputed, although fairly clearly the carrier received a copy on November 8, 2000. The claimant continued to check with the employer for work and on November 15, 2000, the claimant was offered a part-time job (four hours a day), which met the claimant's restrictions, when another worker failed to report to work. The claimant began the part-time job the same day it was offered, November 15, 2000, and continued to work the part-time job until February 27, 2001, when he was fit enough for full-time work without restrictions and either quit his job or abandoned his job to take a better paying full-time job with another employer. The period of disability at issue is from October 17, 2000 (after the claimant was released from jail) through February 26, 2001, the day before he was released to full duty without restrictions.

The carrier argues that on October 17, 2000, the claimant asked the employer for full-time work without mentioning his restrictions and that the claimant accepted the part-

time job without mentioning his restrictions. The carrier implies that the TWCC-73 from Dr. C was tailored to match the part-time job offered to the claimant in order for the claimant to continue to have disability, but other evidence indicates the TWCC-73 was completed and in existence some time before November 15, 2000. The carrier also argues that the incarceration should be viewed "as the equivalent as a termination for cause," but even were that the case, a termination for cause does not automatically mean disability has ended.

Disability is defined as the inability because of the compensable injury to obtain and retain employment at the preinjury wage. Disability is a factual determination for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 001308, decided July 13, 2000. In this case, there is sufficient evidence to support the hearing officer's decision and the Appeals Panel will not disturb the challenged factual determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We do not find them so in this case.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge